

Supreme Court U.S.
FILED

05-721 DEC 8 2005

No. 05-

IN THE

Supreme Court of the United States

MARVIN SMITH,

Petitioner,

v.

UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

SCOTT A. SREBNICK
2400 So. Dixie Highway
Suite 200
Miami, Florida 33133
(305) 285-9010

HY SHAPIRO
2400 So. Dixie Highway
Suite 200
Miami, Florida 33133
(305) 854-8989

Counsel of Record

*Co-Counsel for
Petitioner*

QUESTIONS PRESENTED

- I. Whether the government waives harmless error review of preserved trial errors when it does not argue harmless error on appeal?
- II. Whether this Court should overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)?

PARTIES TO THE PROCEEDINGS

Petitioner Marvin Smith was a defendant and an appellant below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	vi
OPINION BELOW	1
JURISDICTION	2
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	2
INTRODUCTION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
I. THE COURT SHOULD CLARIFY WHETHER THE GOVERNMENT WAIVES HARMLESS ERROR REVIEW OF PRESERVED TRIAL ERRORS BY FAILING TO ARGUE HARMLESSNESS ON APPEAL	7
II. <i>ALMENDAREZ-TORRES</i> SHOULD BE OVERRULED BECAUSE IT IS INCOMPATIBLE WITH THE SIXTH AMENDMENT	14

TABLE OF CONTENTS – Continued

	Page
CONCLUSION	17

TABLE OF CONTENTS – Continued

	Page
APPENDICES	
APPENDIX A:	
Opinion of the Court of Appeals, dated August 18, 2005	1a
APPENDIX B:	
Order of the Court of Appeals Denying Rehearing, dated September 6, 2005	20a

TABLE OF AUTHORITIES

	Page
<i>Cases:</i>	
<i>Almendarez-Torres v. United States,</i> 523 U.S. 224 (1998)	passim
<i>Apprendi v. New Jersey,</i> 530 U.S. 466 (2000)	3, 15, 16, 17
<i>Blakely v. Washington,</i> 542 U.S. 296 (2004)	3, 16
<i>Carducci v. Regan,</i> 714 F.2d 171 (D.C. Cir. 1983)	9
<i>Horsley v. Alabama,</i> 45 F.3d 1486 (11 th Cir. 1995), <i>cert. denied</i> , 516 U.S. 960 (1995)	8
<i>Jones v. United States,</i> 526 U.S. 227 (1999)	14
<i>In re Barr Laboratories,</i> 930 F.2d 72 (D.C. Cir. 1991), <i>cert. denied</i> , 502 U.S. 906 (1991)	10
<i>Lufkins v. Leapley,</i> 965 F.2d 1477 (8 th Cir. 1992), <i>cert. denied</i> , 506 U.S. 895 (1992)	9, 14
<i>McBride v. Merrell Dow and Pharmaceuticals, Inc.,</i> 800 F.2d 1208 (D.C. Cir. 1986)	9

TABLE OF AUTHORITIES – Continued

	Page
<i>Cases:</i>	
<i>O'Neal v. McAninch,</i> 513 U.S. 432 (1995)	8
<i>Ring v. Arizona,</i> 536 U.S. 584 (2002)	3, 16
<i>Singer v. United States,</i> 380 U.S. 24 (1965)	9
<i>Smith v. United States,</i> 419 F.3d 521 (6 th Cir. 2005)	1
<i>United States v. Booker,</i> 543 U.S. 220, 125 S.Ct. 738 (2005)	3, 7, 13, 17
<i>United States v. Giovannetti,</i> 919 F.2d 1223 (7 th Cir. 1990)	11
<i>United States v. Giovannetti,</i> 928 F.2d 225 (7 th Cir. 1991)	passim
<i>United States v. Gonzalez-Flores,</i> 418 F.3d 1093 (9 th Cir. 2005)	8, 12, 13
<i>United States v. Malin,</i> 908 F.2d 163 (7 th Cir. 1990), <i>cert. denied</i> , 498 U.S. 991 (1990)	10
<i>United States v. McLaughlin,</i> 126 F.3d 130 (3d Cir. 1997), <i>cert. denied</i> , 524 U.S. 951 (1998)	8, 13

TABLE OF AUTHORITIES – Continued

	Page
<i>Cases:</i>	
<i>United States v. Olano,</i> 507 U.S. 725 (1993)	8
<i>United States v. Pryce,</i> 938 F.2d 1343 (D.C. Cir. 1991), <i>cert. denied</i> , 503 U.S. 941 (1992)	<i>passim</i>
<i>United States v. Rose,</i> 104 F.3d 1408 (1 st Cir. 1997), <i>cert. denied</i> , 520 U.S. 1258 (1997)	8, 12
<i>United States v. Samaniego,</i> 187 F.3d 1222 (10 th Cir. 1999)	12
<i>United States v. Shepard,</i> 125 S.Ct. 1254 (2005)	3, 15, 17
<i>United States v. Torrez-Ortega,</i> 184 F.3d 1128 (10 th Cir. 1999)	8, 12
<i>United States v. Vanorden,</i> 414 F.3d 1321 (11 th Cir. 2005), <i>cert. denied</i> , __ S.Ct. __ (2005)	13
<i>United States v. Vonn,</i> 535 U.S. 55 (2002)	8
<i>Constitution:</i>	
<i>Sixth Amendment</i>	<i>passim</i>

TABLE OF AUTHORITIES – Continued

	Page
<i>Statutes:</i>	
8 U.S.C. § 1326	14
8 U.S.C. § 1326(b)(2)	14
18 U.S.C. § 2119	14
21 U.S.C. § 841	3, 6, 16
21 U.S.C. § 851	3, 6
28 U.S.C. § 1254(1)	2
<i>Rules:</i>	
FED. R. CRIM. P. 52(a)	2, 8
FED. R. CRIM. P. 52(b)	8

IN THE
SUPREME COURT OF THE UNITED STATES

No. 05-

MARVIN SMITH,

Petitioner,

v.

UNITED STATES,

Respondent.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

PETITION FOR A WRIT OF CERTIORARI

Petitioner Marvin Smith ("Smith") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the Sixth Circuit affirming the District Court's judgment of conviction and sentence is published at 419 F.3d 521 (6th Cir. 2005), and is reprinted in the appendix hereto ("App.") at 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 18, 2005. App. 1a. A timely petition for rehearing was denied on September 6, 2005. App. 18a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 52(a) provides that “[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”

The Sixth Amendment to the Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed....”

INTRODUCTION

This case presents an important and recurring question in the application of Fed.R.Crim.P. 52(a), the “harmless error” rule: whether a federal appellate court may *sua sponte* find that a preserved trial error was harmless where the government waives harmless error review by failing to argue it on appeal and, if so, what factors must guide the appellate court’s exercise of discretion?

This case also presents the ideal vehicle for this Court to overrule its decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), because the district court sentenced Smith to an enhanced mandatory minimum of twenty years based on a prior conviction that was neither alleged in the indictment nor considered by the jury. The decision in *Almendarez-Torres* is